

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

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LINEAR TECHNOLOGY CORPORATION, : Civil Action  
:  
Plaintiff, :  
:  
v. :  
:  
MONOLITHIC POWER SYSTEMS, :  
INC., :  
:  
Defendant. : No. 06-476-GMS

- - -

Wilmington, Delaware  
Friday, May 23, 2008  
9:55 a.m.  
Conference

- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

APPEARANCES:

KAREN JACOBS LOUDEN, ESQ., and  
JAMES WALTER PARRETT, JR., ESQ.  
Morris, Nichols, Arsht & Tunnell  
-and-  
JOEL M. FREED, ESQ.,  
MATTHEW CUNNINGHAM, ESQ., and  
JIMMY SHIN, ESQ.  
McDermott Will & Emery LLP  
(Washington, D.C. and Silicon Valley, CA)

Counsel for Plaintiff

## 1 APPEARANCES:

2 RICHARD L. HORWITZ, ESQ.  
Potter Anderson & Corroon LLP

3 -and-

4 MARK A. FLAGEL, ESQ.,  
DEAN G. DUNLAVEY, ESQ., and  
5 DAVID McKONE, ESQ.  
Latham & Watkins  
(Chicago, IL)

6 -and-

7 CLAUDE M. STERN, ESQ.,  
ALLISON E. MONAHAN, ESQ., and  
8 ALAN BLUM, ESQ.  
Quinn Emanuel  
(Silicon Valley, CA and New York, N.Y.)

9 Counsel for Monolithic

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11  
12 THE COURT: Good morning.

13 (Counsel respond "Good morning.")

14 THE COURT: Counsel, this is an office  
15 conference, so, please, take your seats.

16 I noticed that on the order, in the opinion just  
17 issued, it is titled "Memorandum," but we have changed that.

18 Plaintiffs here?

19 MS. JACOBS LOUDEN: Yes, Your Honor. Hello.

20 Karen Jacobs Louden from Morris Nichols. I am here with my  
21 colleague James Parrett. From McDermott, Will & Emery we  
22 have Joel Freed, Matthew Cunningham and Jimmy Shin.

23 MR. HORWITZ: Your Honor, Rich Horwitz from  
24 Potter Anderson. With me today from Latham & Watkins are  
25 Mark Flagel and Dean Dunlavey, And from Quinn Emanuel Claude

1 Stern & Alan Blum.

2 In the second table, Allison Monahan from Quinn  
3 Emanuel, and David McKone from Latham & Watkins. And from  
4 our client back behind the Court, Soria Chang.

5 THE COURT: Good morning.

6 We are going to try to get them to turn the heat  
7 off.

8 Sorry for the belated issuance of the opinion.  
9 I wanted to give you a chance, I hope you have had a chance  
10 to at least read it, if not digest it, at least read it and  
11 to at least give it some thought. If not, also, I don't  
12 know if you had a chance to talk among yourselves, the  
13 parties, that is, because obviously, the ruling is going to  
14 affect significantly our discussion today. I am certainly  
15 willing to give you some additional time to do that, if you  
16 think that that would be time well-spent. I think it would  
17 be, quite frankly. But we don't have to. But I think there  
18 are some things that you can now agree on, whether you agree  
19 or not, there are some things that you can now agree on,  
20 given the Court's ruling.

21 What is your pleasure?

22 MR. FLAGEL: We have had a short discussion, Mr.  
23 Freed and I have had a short discussion, so I am not sure  
24 that further discussion right now will be well-spent.  
25 Certainly, there will be discussion after today, I assume

1       there will be, between now and four weeks from now.

2               THE COURT: I would expect so.

3               MR. FLAGEL: It probably makes sense to talk  
4       about some of the other issues.

5               THE COURT: Here is, then, how I would like to  
6       proceed. Typically, I will talk about or have discussions  
7       with you about your motions in limine at the outset, then go  
8       through the pretrial order, the proposed pretrial order.  
9       There didn't seem to me to be much there that was  
10      controversial. I would give the parties an opportunity to  
11      point anything out to me that I have missed in my perusal of  
12      the proposed order.

13              Not necessarily in the order of agenda, we will  
14      talk about preliminary instructions to some extent, because,  
15      again, I think the ruling is going to impact your positions  
16      on some things there.

17              I would like to offer a suggestion on the  
18      preliminary instructions. That is, rather than having me  
19      read through the various parts of the patent and explain  
20      that verbally, that you consider using the video in lieu of  
21      those sections of the preliminary instructions. I am always  
22      willing to do it when the parties agree. It's not always  
23      the case that the parties agree on the video. I  
24      well-understand why at times a party may not want to use the  
25      video. I think it's pretty well-done. I don't think it's

1     dated yet. It gives, I think, a fairly objective overview  
2     of the PTO and the process.

3             I know, depending upon your point of view, you  
4     don't like seeing the examiner pushing around that cart  
5     that's laden with work. I know that some people feel that  
6     is an editorialization that is unfortunate in the  
7     production. But it is sort of the way it is down there. I  
8     actually had examiners on my staff as externs, examiners and  
9     in other ways. So I do have a pretty good sense, though I  
10    am not a member of the Patent Bar and haven't visited the  
11    PTO, and I probably should do that, but I do have a pretty  
12    good sense of what things are like there and how they work  
13    and how they look.

14            Nevertheless, we can talk about that.

15            We can talk about the voir dire. I don't see  
16    anything controversial about the voir dire. There are a  
17    couple of questions, I think three, that might merit a  
18    little bit of discussion, but not a lot.

19            I am not planning to deal with the final jury  
20    instructions today. Typically, I understand that counsel  
21    don't pay a lot of attention at this stage, haven't yet had  
22    a chance to really engage those issues. I know there are  
23    going to be differences of view. Again, to some extent,  
24    those instructions are going to be informed in how they  
25    ultimately look at the end of the day by the Court's ruling

1 recently.

2 Generally, we will talk about some of my nits  
3 and nudges, generally, do's and don'ts.

4 And we will open the floor for any questions or  
5 items.

6 MR. FREED: Your Honor, I had one thought, given  
7 the ruling. That was, since the issue on validity is now  
8 kind of a contingent one, whether it would make sense in  
9 this case to have a phased trial with the same jury and just  
10 have validity come after the jury came back with a verdict  
11 on the issue of the ZX circuitry.

12 THE COURT: I wouldn't say that it doesn't make  
13 sense. I have thought about it. I am not hidebound about  
14 it at this point. It's something that I am willing to talk  
15 about at some point during this process. Okay.

16 MR. FLAGEL: Your Honor, the one motion in  
17 limine that I would like to focus on, if you would indulge  
18 me for a minute, it's our Motion in limine No. 2, and it  
19 relates exactly to the ZX circuit issue. It also plugs into  
20 Mr. Freed's question.

21 Basically, Your Honor, it is our motion to  
22 preclude them from arguing to the jury --

23 THE COURT: That is a summary judgment motion,  
24 counsel, and I am not going to entertain it. That is the  
25 long and short of it.

1 Anything else before we get started ?

2 I am denying MPS's Motion in Limine No. 2, which  
3 is styled -- it is docketed Item No. 142. It is Monolithic  
4 Power Systems' Motion in Limine No. 2 To Preclude Linear  
5 Technology from Presenting any Evidence or making any  
6 Argument that the accused MP1543 part contains the ZX  
7 Circuitry Identified by Counsel for Linear in the ITC  
8 Proceeding.

9 Again, that's what I classici ally view as a  
10 stealth motion for summary judgment. And I won't entertain  
11 it.

12 The motion I am really most interested in  
13 discussing is at 146. It's Plaintiff's Motion No. 1,  
14 Linear's Motion in Limine No. 1, To Preclude Monolithic from  
15 offering at Trial Evidence and/or Argument that the Asserted  
16 Claims are Limited to two States of Operation. The only  
17 reason I am most interested in discussing it: I believe  
18 both parties are asking the Court to open claim  
19 construction.

20 You go first.

21 MR. FREED: Your Honor, I think the substance of  
22 our argument is this: We don't intend, in any way, shape or  
23 form, to preclude them from arguing that they don't have one  
24 of the circuits, either the first circuit, the second  
25 circuit, or the third circuit. But we do believe that they

1 shouldn't be allowed to make the argument that they don't  
2 have one of these circuits because they have an additional  
3 circuit, because that really twists the claim from a  
4 "comprising" claim into a "consisting" claim.

5 I don't want any different ruling on what these  
6 circuits are. I am not asking for any different ruling on  
7 what these circuits are. If I asked for a different one  
8 before, I asked for it. I am not asking for a  
9 reconsideration of that. I am not asking for a new  
10 consideration. I am just asking that they shouldn't be  
11 allowed to present to the jury argument or evidence that the  
12 reason you can't find we have a third circuit or a second  
13 circuit is because we have this additional circuit, because  
14 that would, indeed, both change your claim construction and  
15 be inconsistent with your claim construction, and would,  
16 indeed, making a "consisting of" claim into a "comprising"  
17 claim.

18 It would, indeed, be saying that I can't  
19 infringe a patent on a mechanical pencil because I put an  
20 eraser on the pencil even though the eraser is not mentioned  
21 anywhere in the claim.

22 That's it.

23 MR. McKONE: David McKone, Your Honor.

24 This is a comprising claim. However, the law,  
25 the Federal Circuit has held that even if a claim is a



1 comprising claim, that can't be used as a, quote, "weasel  
2 word" to get out of the every-day claim limitation.

3 THE COURT: Are you asking me to reopen claim  
4 construction?

5 MR. MCKONE: We don't believe it is necessary to  
6 reopen claim construction. The plain language of the claims  
7 is written such that there is no intermediate state between  
8 the first state of circuit operation and the second state of  
9 circuit operation.

10 THE COURT: It sure sounds like you are asking  
11 me to open claim construction up. But make your argument.

12 MR. MCKONE: Regarding whether we are asking you  
13 to reopen claim construction based on changing our position,  
14 that certainly hasn't been the case here.

15 Prior to the claim construction briefing, we  
16 raised the issue that the accused product does not have the  
17 second circuit -- I am sorry, the second state of circuit  
18 operation and the threshold fraction limitation. But at  
19 that time Linear was contending that the accused product  
20 was, in fact, a two-state product, one where it transitioned  
21 from a continuous mode, which it was calling the first  
22 state, to a second state that consisted of both the  
23 discontinuous mode and the pulse-skip mode.

24 That was the framework prior to the claim  
25 construction briefing that's been filed.

1           After the claim construction briefs had been  
2       filed, Linear served its expert report, and for the first  
3       time there, Linear contended that the accused product was a  
4       three-stage product, at least, one where it transitioned  
5       from a continuous mode, which it seems to be calling the  
6       first state of circuit operation, to a discontinuous mode,  
7       and from there into a pulse-skip mode, and somewhere in the  
8       pulse-skip mode is where they are identifying the second  
9       state of circuit operation.

10           Our expert report --

11           THE COURT: That is the first time that we have  
12       seen this argument?

13           MR. MCKONE: Yes. Our expert report was merely  
14       responding to that argument, pointing out that that was  
15       inconsistent with the claim language as well as the  
16       prosecution history and the specification.

17           MR. FREED: Briefly, Your Honor. During claim  
18       construction, we weren't talking about what infringes and  
19       what doesn't infringe at all. We were just talking about  
20       construction of the claim, because construction of the claim  
21       isn't dictated by what infringes. Our position on  
22       infringement was and always is that all you have to do is  
23       have what the claim calls for and whether you have anything  
24       else doesn't matter.

25           So we have never changed our position on that.

1 It has been continuous on that. Nor did we ever take the  
2 position that the claims were limited in some way to  
3 continuous stages without any intervening stages or anything  
4 like that. It's not a first-time argument.

5 What is the first-time argument is that the  
6 claim should be construed in a way that would permit you to  
7 close the claim when it's an open claim.

8 MR. MCKONE: Your Honor knows that claim  
9 construction is not supposed to be with respect to the  
10 accused product. But at the same time, you don't want us  
11 bringing up arguments that are not pertinent to what they  
12 are alleging our accused product is doing.

13 So it didn't make sense prior to the claim  
14 construction briefing to phrase our arguments in terms of a  
15 three-state product wouldn't infringe. Instead, what we did  
16 is looked at what they identified as a second state, which  
17 included both what they are now identifying as a second  
18 state plus what they are now identifying as the intermediate  
19 state, and pointing out those two states together did not  
20 meet the claim language for second state of circuit  
21 operations.

22 When they came up with the new analysis in the  
23 expert report, we had to respond to that new analysis.

24 THE COURT: I am listening.

25 This is one I am going to have to take under

1       advisement and think about a little bit and get back to you  
2       in some written form.

3               All right. Let's go to Linear's No.2, Docket  
4       Item 147. It's a Motion to Preclude Monolithic from Raising  
5       Issues of Inequitable Conduct and Patent Misuse before the  
6       Jury.

7               And, perhaps I should -- just bear with me one  
8       second.

9               (Pause.)

10              THE COURT: We had originally set eight days  
11       aside for this case. Right?

12              MR. FREED: That's correct, Your Honor.

13              THE COURT: It is not going to take eight days.  
14       One of the reasons it is not going to take eight days for  
15       the jury to try this case is I am going to grant this  
16       motion, for purely prudential reasons, quite frankly. I am  
17       going to be very up front about that.

18              We start the 23rd.

19              MR. FREED: Correct, Your Honor.

20              THE COURT: Here is the thing, counsel. I am  
21       going to have to recess this trial for part of one day on  
22       the 26th and all of the 27th. We will resume on that  
23       Monday, the 28th. I have a matter I have to attend on our  
24       left coast for the Federal Circuit Bar Association.

25              And then, I am not going to put the jury or you

1 in a position of having the jury being focused more on the  
2 impending July 4th Holiday in its deliberations.

3 I think a couple of rulings are going to impact  
4 the amount of time that we are going to discuss today, the  
5 amount of time that you are going to need. But this we are  
6 not going to discuss, because I am going to grant it, for  
7 the reasons I have just outlined.

8 I think that should cut down the amount of time  
9 that will be needed with the jury.

10 Counsel well-know that I have handled  
11 inequitable conduct issues in each of the three ways that  
12 the Federal Circuit has endorsed. If the parties agree, I  
13 have let it go to the jury. I have used the jury as an  
14 advisory jury, and taken on the issues as the Court deciding  
15 the issue. In this instance it would be the Court that  
16 would decide those issues.

17 So that motion is granted.

18 No. 3, this is at Docket Item No. 148, it's  
19 Linear's Motion to Preclude Monolithic from Referring to, or  
20 Offering Evidence relating to, the Amount of Sales of the  
21 Accused MP1543 Product or the Stipulated Amount of Patent  
22 Infringement Damages before the Jury.

23 Counsel.

24 MR. FREED: Your Honor, it is a simple motion.  
25 Patent infringement damages is not an issue in this case

1 because there has been a stipulation on damages. To the  
2 extent there is an infringement case here, the question is  
3 just simply infringement, and the amount of damages isn't  
4 before the jury.

5 There is one reason and one reason only for the  
6 other side to put the issue of the amount of damages in  
7 front of the jury. And that is to have the jury be thinking  
8 about, well, this isn't such a big deal because the damages  
9 are small, which is not relevant to the question of breach  
10 of contract or to the question of infringement. So it can  
11 only be used for a purpose inappropriate, in our view.

12 MR. FLAGEL: Your Honor, Mr. Freed talks about  
13 the amount of damages. But he doesn't mention the amount of  
14 sales. They are asking that we be precluded from telling  
15 the jury that only a hundred of these actual small circuits  
16 were ever delivered in the United States to customers.

17 They have an indirect infringement argument. In  
18 order to prove indirect infringement, they have to actually  
19 prove that a customer used these chips. They have no  
20 evidence, by the way, that any customer used the chips.  
21 They want to say that we have sold products and therefore  
22 their customers must have used the chips in accordance with  
23 data sheets. Only a hundred were sold, and there is no  
24 evidence that anybody used them.

25 In this kind of business, you have to buy a lot

1 of these things. These are tiny little circuits that are  
2 used in devices. The fact that only a hundred were sold is  
3 strong evidence that there was never any use by a customer  
4 of this product in any way, much less in an infringing way.

5 So it is very relevant to that.

6 It is also relevant because Linear is going to  
7 argue that commercial success is evidence of nonobviousness.  
8 This product didn't sell at all. Nobody bought it. They  
9 are alleging it's infringing.

10 If they are right about that -- we think they  
11 are not -- but if they are right, then it's strong evidence  
12 of obviousness, not nonobviousness, and it's really  
13 important to rebut their argument of indirect infringement.

14 THE COURT: Counsel seems to concede the point  
15 as to the liquidated damages issue.

16 MR. FREED: It appears that way, Your Honor.  
17 The two issues on the indirect infringement, there is a  
18 false logic there, Your Honor. We don't have to prove  
19 that -- let me put it this way: If they sold one of them,  
20 the issue of whether or not there was a direct infringement  
21 doesn't depend upon whether they sold two, three, or 3,000.  
22 Our evidence of direct infringement in that context, we have  
23 direct infringement by themselves. But the direct  
24 infringement that supports our indirect infringement claim,  
25 i.e. direct infringement by customers, is a circumstantial

1 case that is proved under the law by proof that there is no  
2 substantial use other than for the intended purpose. That  
3 will be our proof, that there is no substantial use other  
4 than for the intended purpose.

5 That is true for one, it's true for ten, it's  
6 true for 2000. If they only sold a hundred, that doesn't  
7 change the fact that the only substantial use people buy  
8 those for is their intended purpose, and therefore the jury  
9 is allowed to conclude circumstantially that the direct  
10 infringement occurred.

11 Customers didn't use these things for  
12 paperweights or ships' ballast. If they want to make that  
13 argument, that is fine. But they shouldn't be able to make  
14 the argument that, just because they sold a hundred of them,  
15 that customers didn't use them for the intended purpose.

16 On the issue of obviousness, that is a very  
17 novel theory, Your Honor. The fact that there is commercial  
18 success by our product and therefore that that is a  
19 secondary consideration of nonobviousness isn't negated by  
20 the fact that they only sold a hundred, especially when we  
21 have testimony that they pulled them from the market because  
22 of this case.

23 There is no bearing on their having pulled this  
24 thing from the market on this being nonobvious. The  
25 argument that somehow or other, that because they only sold



1 a hundred is a circumstance of the obviousness of the  
2 invention is, frankly, silly, Your Honor.

3 MR. FLAGEL: A couple of points. On liquidated  
4 damages, I might have made an unfair assumption. Since you  
5 had ruled inequitable conduct, you were going to hear it,  
6 given the jury constraints, I sort of assumed you were going  
7 to hear liquidated damages and whether that's enforceable.

8 THE COURT: That is fine.

9 MR. FLAGEL: If it goes to the jury, I think it  
10 has to be denied, because if they are going to ask the jury  
11 for three million dollars in liquidated damages, I do think,  
12 in determining whether --

13 THE COURT: What is your reaction to that?

14 MR. FREED: My reaction is that's got a time  
15 warp associated with it. The issue of the viability of  
16 liquid damages is the date of the contract, not what  
17 happened afterwards. Not what they did sell, but whether it  
18 was reasonable under the circumstances of the envisioned  
19 activity -- and most of the liquid damages testimony we are  
20 going to put on doesn't have to do with sales as such, but  
21 has to do with the aggravation and the diversion of  
22 employment activity that occurs when somebody infringes a  
23 patent at a later point in time.

24 But even as to damages, even as to damages, it  
25 is what is contemplated at the time, not what actually

1 happened. That is not a relevant factor of whether the  
2 parties reasonably had in their contemplation what would be  
3 appropriate liquidated damages when they entered into the  
4 contract. The fact that they only sold a hundred after  
5 there was a breach or alleged breach and a withdrawal from  
6 the market doesn't change the viability of that. It's not  
7 what you did do. It's whether the parties were reasonable  
8 at the time they entered into the agreement.

9 MR. FLAGEL: I disagree. I think the law is  
10 clear that the actual damages that somebody seeks is a  
11 relevant fact in determining whether the amount of  
12 liquidated damages is an unenforceable penalty. On that  
13 point, I think he is wrong.

14 THE COURT: I think he is right. I am going to  
15 hear the liquidated damages issue. I agree with you on  
16 that, not necessarily on the law.

17 MR. FLAGEL: Responding on the hundred units,  
18 again, he is asking you to just sort of assume that because  
19 we sold a hundred they were obviously used and that we can't  
20 tell the jury. He wants to preclude us from arguing to the  
21 jury that there is no evidence of indirect infringement  
22 because only a handful of these are sold. These are  
23 typically only used when lots of them are sold. They might  
24 have been put on the shelf. We don't know.

25 There is no evidence, and it is their burden to

1       come forward with evidence. And how can our hands be tied  
2       from telling the jury, ladies and gentlemen, they have no  
3       evidence?

4                   There were only a very few of these sold before  
5       we stopped selling them.

6                   THE COURT: What is your reaction to his  
7       observations regarding the alleged novelty of your theory,  
8       as it bears on the issue of secondary considerations and  
9       obviousness?

10                  MR. FLAGEL: To the extent that the jury finds  
11       that these 100 pieces infringe, then the fact that nobody  
12       wanted them is directly relevant to the commercial success  
13       point.

14                  THE COURT: So your position is that there is at  
15       least a material dispute of fact as to whether anybody  
16       wanted them and that is a jury issue.

17                  MR. FLAGEL: Yes.

18                  THE COURT: Go ahead.

19                  MR. FREED: Your Honor, I think I have said it  
20       all. The evidence is they pulled them from the market.

21                  THE COURT: The jury can hear that. I will let  
22       the jury hear that.

23                  The motion is granted in part, denied in part,  
24       however you want --

25                  MR. FREED: You are going to hear the liquidated

1 damages.

2 THE COURT: I am going to hear the liquidated  
3 damages, and deny the motion as to the numbers of units.

4 MR. FLAGEL: Thank you, Your Honor.

5 I think that's all of plaintiff's motions.

6 So we are on MPS's No. 1. There is actually 1A  
7 and B, I think. Correct me if you think I am wrong about  
8 that. But there is the motion at 141, which seeks to  
9 preclude Linear from presenting to the jury evidence and  
10 argument concerning the enforceability of the three million  
11 dollars liquidated damages provision in the settlement and  
12 license agreement. Then there is this 140, is the docket  
13 item, I think I have got it right. This is bifurcation. I  
14 think they are together.

15 MR. MCKONE: I think Your Honor has ruled.

16 THE COURT: I think I have.

17 So we are now on 3. This is at 143. This is a  
18 Motion to Preclude Linear from Presenting any evidence  
19 Concerning its Settlement and License Agreements with Third  
20 Parties, including Maxim Integrated Products.

21 I think the central issue is whether the  
22 licenses are relevant to the question of nonobviousness.

23 MR. FREED: I think so, Your Honor.

24 MR. HORWITZ: Your Honor, we think this is a  
25 cut-and-dried motion in limine. Frankly, we are surprised

1 we had to bring it, based on Your Honor's rulings and other  
2 rulings from other Judges in this Court.

3 If it is a litigation settlement license, it  
4 doesn't come in under Rule 408 and under Rule 403. That's  
5 what we are talking about here.

6 And the comments that were made after by Maxim's  
7 CEO relate to the settlement of litigation license. So it  
8 is all part of the same package.

9 They say that, well, his statements are  
10 different, they are not offered for the truth of the matter.  
11 They obviously are.

12 It seems pretty cut and dried, Your Honor.

13 THE COURT: Well, there seems to be a debate  
14 about whether Telcordia is distinguishable.

15 MR. HORWITZ: I really don't think there is any  
16 basis to distinguish either Telcordia or Pharmastem. The  
17 basic concept is, if it's a license agreement that arises  
18 out of settlement of litigation, it doesn't come in for this  
19 purpose, under both Rule 408 and Rule 403, for undue  
20 prejudice.

21 MR. FREED: Again, Your Honor, the issues  
22 involved in Telcordia are different from the issues involved  
23 here. This is specifically directed to this patent. There  
24 is no question that it's a relationship to this patent.

25 We also have the additional evidence where there

1 is no secret about why the license was taken. The man  
2 stated, in a situation where he would have serious  
3 securities problems if he were not telling the truth, why he  
4 took the license. He said on the public record in one of  
5 these securities deals where you have to be straightforward  
6 with your audience that he took it because there was no good  
7 prior art and because it was a broad patent. If there was  
8 ever a secondary consideration of nonobviousness, that is  
9 it.

10 MR. HORWITZ: Your Honor, on the first point,  
11 Pharmastem is just the same. Telcordia may have had --  
12 there may have been more patents. But the concept in all  
13 the cases is the same. It doesn't come in because of the  
14 other considerations.

15 To suggest that the CEO who is talking about  
16 those license agreements, that somehow insulates them from  
17 the rule that otherwise applies, it just dissolves the rule.  
18 And clearly, it's hearsay. It's being offered for the truth  
19 of the matter asserted. Plain and simple.

20 THE COURT: I want to make sure that my ruling  
21 is consistent with previous pronouncements of this Court.  
22 So I am going to reserve on this one. I will announce this  
23 in writing. These are not going to be long pontifications.  
24 They will just be short "Whereas" orders.

25 I will let you try to tell me why this isn't

1 another motion for summary judgment No. 4.

2 MR. DUNLAVEY: Your Honor, this is sort of a  
3 piece of the earlier Motion in Limine No. 3 of Linear's that  
4 you denied.

5 This is a case where they have the burden of  
6 establishing infringement. They are now proceeding under  
7 two theories of direct infringement and an indirect  
8 infringement theory. The indirect infringement theory is  
9 that somehow one of these 100 chips, which itself doesn't  
10 infringe, must have been used by somebody.

11 They didn't undertake any discovery of this.  
12 The chips went to two companies. They didn't go to either  
13 one of those companies to find out whether those chips are  
14 gathering dust, whether those chips were subsequently sold  
15 to other companies.

16 They haven't done -- they also have this  
17 contention that only appeared in their expert's report that  
18 the indirect infringement was induced by MPS supplying the  
19 chip and data sheets to these customers. There is no  
20 evidence that MPS has provided a data sheet to any of these  
21 companies in the chain of command. So there is just a  
22 complete absence of proof here.

23 THE COURT: Can I handle this on JMOL? If there  
24 is a failure of proof, there is a failure of proof.

25 MR. DUNLAVEY: That's one way to do it.

1 THE COURT: That is the way I will do it. So I  
2 am going to deny this.

3 MR. FLAGEL: For the record, Your Honor, we are  
4 hoping you are going to handle No. 2 that way, too, even  
5 though it has been denied.

6 THE COURT: Sure. If there is an appropriate  
7 basis on JMOL, Rule 50, Rule 52, whatever the relevant rules  
8 are.

9 Finally, No. 5 is MPS's Motion to Preclude  
10 Linear from Presenting Hearsay Evidence to the Jury,  
11 Including any Evidence concerning the ITC Proceedings.

12 To sort of short-circuit this, I thought we  
13 could address these objections to the extent they arise in  
14 realtime. Is that problematic from MPS's point of view?

15 MR. DUNLAVEY: In theory, no. I think that in  
16 practice it might be difficult in that I think that they  
17 will try to present a flood of evidence about the AATI case  
18 and about the Impala case through their expert witness,  
19 which I think is completely improper. And their expert  
20 witness' report is just replete with references to those two  
21 litigations. Why we can't focus on the facts of this case,  
22 I don't know.

23 You have already told us, we are not having  
24 eight days. We are having something substantially shorter.  
25 The notion that we are going to have to try AATI's



1 infringement and its invalidity claims and the Impala  
2 decision and the products that were at issue in this case,  
3 and intermittent statements by people in that case, I think  
4 it flies in the face of, number one, what we are entitled to  
5 under the rules of evidence, but also your Court's schedule.

6 MR. FREED: We have no intention of retrying the  
7 AATI case or any other case. I think the proper way to deal  
8 with this is if we go out of bounds on what we are doing, we  
9 deal with it on a realtime basis, as you suggested.

10 Our expert isn't going to get up there and talk  
11 about the other case. They want to hamstring him to make  
12 sure that he can't even mention something in connection with  
13 the other case when it is directly relevant to testimony  
14 that he has given.

15 He is not up there to tell everybody what  
16 happened in the other case. He is up there to tell  
17 everybody about the issues in this case. In the course of  
18 doing that, on occasion, on his opinions, there will be a  
19 reference to the other case, but that is not going to be  
20 terrible, and it's not going to be retrying.

21 THE COURT: What kind of reference?

22 MR. FREED: They assert that particular things  
23 are very good evidence on invalidity -- we are on the  
24 invalidity theory -- these things are terrific evidence on  
25 invalidity and no one ever knew about these things before.

1 And he says, no, in fact, these are the very issues that I  
2 dealt with before and they were wrong before and they are  
3 wrong now.

4 It's not to prove the other case.

5 THE COURT: Why does he need to say that?

6 MR. FREED: Only because they are making believe  
7 that this is all fresh evidence that has never surfaced  
8 before, when, in fact, this is really yesterday's dinner  
9 warmed over again and this guy is treating it as yesterday's  
10 dinner warmed over again. And it should be treated that  
11 way, because that's what it is.

12 MR. DUNLAVEY: Your Honor, the notion that Mr.  
13 Blauschild can get up and say, Oh, I addressed this in  
14 another case and it was garbage in another case --

15 THE COURT: That is not going to happen. And I  
16 don't want to have to deal with that.

17 I am going to grant this motion. To the extent  
18 that you elicit from the witness testimony that is properly  
19 adduced, that doesn't improperly, in my view, reference  
20 other proceedings, I will permit it.

21 But I have granted the motion. And I would  
22 expect you to abide by its spirit, if not its letter.  
23 Please, we can still address issues in realtime.

24 MR. FREED: I understand. There was a separate  
25 part of this thing that looked like it was trying to

1 preclude us from using Wilcox's testimony from that prior  
2 case. This is one of the inventors who has a very serious  
3 medical condition. It is clearly within the rules --

4 THE COURT: Let's talk about that.

5 MR. DUNLAVEY: There is an issue there, yes.  
6 Mr. Wilcox was not deposed in this case. He was deposed in  
7 an earlier case that MPS was not party to. We were not  
8 given notice of that. This happened years ago. They have  
9 made no showing, by the way, that Mr. Wilcox presently is  
10 unavailable. They simply didn't list him on their witness  
11 list.

12 I understand that in the case that was before  
13 Your Honor up until recently, the Linear versus Analog  
14 Devices case, that Mr. Wilcox was noticed for deposition  
15 and, in fact, he showed up for his deposition. But the  
16 parties had settled before his deposition actually took  
17 place.

18 So, number one, under Rule 32, his deposition  
19 testimony should not come in.

20 Number two, they haven't made any showing that  
21 he is unavailable at present. They have some doctor's note  
22 from 2005 and another one from 2006, saying that his health  
23 is such that it might be difficult for him to travel to the  
24 trial. There is nothing from 2008. And certainly, we were  
25 not informed at the time when we could undertake discovery

1 on this issue that they were going to claim that Mr. Wilcox  
2 was unavailable.

3 I understand that in the other litigations,  
4 people have found out that Mr. Wilcox is out taking hikes in  
5 the Sierras. He is out gazing at stars late at night. He  
6 is engaged in all kinds of discussions with people.

7 There is just no evidence before you that he is  
8 unavailable.

9 So for all of those reasons, I think that Mr.  
10 Wilcox's testimony from the Impala case -- again, we never  
11 had a chance to question him -- is not admissible.

12 THE COURT: The Analog Devices case, when was he  
13 noticed and prepared to appear for that deposition, roughly  
14 speaking?

15 MR. DUNLAVEY: Your Honor, I would have to  
16 check.

17 THE COURT: Was it last year?

18 MR. DUNLAVEY: Yes, it was 2007, or early part  
19 of 2008.

20 MR. FREED: Your Honor, that's not quite the  
21 whole story. Back when they were involved with the Linear  
22 litigation, the doctor's certificate or note or whatever you  
23 want to call it was presented to them. And they agreed not  
24 to take his deposition under those circumstances. They  
25 actually agreed to that.

1           Analog re-raised the issue, including all the  
2           issues about the fact that the guy does go outside of his  
3           house. It is not that he is dead. It's that the doctor  
4           thinks that this is just going to hurt him.

5           THE COURT: Where does he live?

6           MR. FREED: He is in California. I am not sure.  
7           Arizona.

8           THE COURT: How old is the gentleman?

9           MR. FREED: Early sixties, I guess, late  
10          fifties. I don't know what the medical --

11          THE COURT: Without putting his entire medical  
12          history on the record, what is the condition from which he  
13          suffers?

14          MR. FREED: I was unclear about it, because I  
15          wasn't involved. I do know that when that issue was raised  
16          in the Analog case, the Judge re-looked at the thing again  
17          in the Analog case, and said basically there is no -- you  
18          shouldn't be dragging this guy here. The fact that he went  
19          outdoors isn't the end of the story. He shouldn't be forced  
20          to go through testimony and that kind of stress.

21          THE COURT: All I have right now is attorney  
22          argument. I don't have any declaration. I don't have  
23          anything from a doctor, a physician, or from the gentleman  
24          himself as to his condition. All I have is, admittedly,  
25          representations by officers of the Court. And I tend to

1 trust you guys, men and women. But these are competing --  
2 yes.

3 MR. DUNLAVEY: That's exactly right, Your Honor.  
4 And it's their burden of showing that he is unavailable. He  
5 is not on their witness list. They never raised this issue  
6 before. They failed to meet their burden. So that should  
7 be the end of the matter.

8 MR. FREED: Your Honor, at this point, if we  
9 need to provide those things to the Court, we will.

10 It may be that this person, we may want to use  
11 him only on validity issues. And if that's so and if we do  
12 have this staged trial and it comes up at that point in  
13 time, this may all wash out. In the meantime, if we need to  
14 get those doctor things and statements, we can get them.

15 THE COURT: Okay. That's one complaint that has  
16 been raised by MPS. But I think they have at least one  
17 other that I recall. That is, that you were not a  
18 participant in the other proceeding.

19 MR. DUNLAVEY: That is absolutely correct.

20 THE COURT: That is a part of the requirement of  
21 the rule, it seems to me.

22 MR. FREED: The rule requires that they have an  
23 aligned interest. Clearly, there was an aligned interest  
24 there. In fact, that was the secret proceeding that  
25 involved all the warmed-over meals that I spoke about

1 earlier. They had an aligned interest.

2 MR. DUNLAVEY: I don't believe that MPS had even  
3 come into existence at the time that the initial lawsuit was  
4 filed, Your Honor. It was not a party to Impala. It had no  
5 knowledge about the proceedings in Impala. Rule 32  
6 specifies that in such a condition, that his deposition is  
7 not admissible. And again, if they wanted to have raised  
8 this issue, they should have raised it during the time that  
9 we had an opportunity to actually conduct some discovery.

10 THE COURT: I am constrained --

11 MR. FREED: Your Honor, on the issue of did they  
12 have an opportunity to take discovery from this guy, I have  
13 to say this. I know it's a strong word. I have to say,  
14 that is a little disingenuous. We are talking about an  
15 inventor on the face of the patent.

16 To argue they had no opportunity or no  
17 knowledge, I mean, Rule 26 disclosures talk about  
18 disclosures are otherwise made known. Well, the patent on  
19 its face otherwise makes known this guy's contact with the  
20 subject matter of this litigation.

21 To say that he is a complete surprise to them,  
22 when, in fact, they were the ones who said give us  
23 everything involved in the AATI litigation, he is on the  
24 face of the patent, they had access completely to the files  
25 in the other litigation.

1           To argue that they had no opportunity to take  
2           this guy's deposition I think is disingenuous, Your Honor.

3           MR. DUNLAVEY: He wasn't on the witness list and  
4           they didn't produce the information from the Impala case  
5           back in this case until sometime in 2007. For them to say,  
6           oh, even though we don't have him listed on our witness list  
7           and he is not in our initial disclosures that you then have  
8           an obligation to go out or else we can use some depositions  
9           in a previous case that you didn't participate in, that, I  
10          think, is disingenuous.

11          THE COURT: I won't get into characterizing one  
12          party's view or the other. But I at this point am  
13          constrained to conclude that the requirements of Rule 32  
14          have not been met by the plaintiff. Should it come to  
15          pass -- well, I am going to leave it there. I am going to  
16          grant that part of the motion.

17          MR. FREED: Your Honor, I don't want to --

18          THE COURT: Here is -- look: I don't want to  
19          have this Court or the parties have a material and  
20          potentially adverse impact on the health of a party or a  
21          nonparty.

22                 I am not going to allow, not that you intended  
23          this, but that issue, the individual's health, Mr. Wilcox --  
24          Doctor or Mister?

25          MR. FREED: Mister, I think.



1 THE COURT: -- Mr. Wilcox's health and the  
2 vagaries of his situation work to the detriment, to unfairly  
3 prejudice the other side.

4 If it should come to pass that this is -- we  
5 would have to know this very soon -- that this is evidence  
6 that you deem critical and that he could be made available  
7 conveniently for a deposition, I might consider a request to  
8 revise my ruling. Right now, the ruling is what it is.

9 MR. FREED: Your Honor, I think it unlikely that  
10 we are going to want to put him in that position. Thank you  
11 for that potential opportunity. I know you haven't agreed  
12 to it. You said it's a potential opportunity. I think it's  
13 unlikely that we are going to want to put him in that  
14 position. And if it comes to that, all I would ask is that  
15 we don't have some argument in front of the jury, Boy, this  
16 guy isn't here at trial and therefore --

17 THE COURT: A, I think that would not be quite  
18 kosher.

19 MR. DUNLAVEY: Of course not, Your Honor.

20 THE COURT: I won't permit that. It's not  
21 intended.

22 MR. FREED: That may be the way this washes out,  
23 because we are not going to endanger this guy's health.

24 THE COURT: I am glad to hear that.

25 All right. I gather everyone agrees with me

1       that we should defer discussion about the preliminary jury  
2       discussions?

3               MR. FREED: I think they need to be looked at  
4       again, Your Honor, given your rulings.

5               THE COURT: I think they do.

6               MR. FREED: I can't remember specifically which  
7       ones, but I am guessing your rulings are going to impact  
8       some of those.

9               THE COURT: I have some tabs. I will just  
10      highlight the pages that I have tabbed. There is the  
11      parties and their contentions at Page 4. It goes on, Linear  
12      sets forth its objections specifically on the next page.  
13      Then the next one I see is at Page 8, the burden of proof,  
14      that begins a conversation. That is Linear's proposal as to  
15      the burden of proof and the MPS objections on the following  
16      page.

17              Then MPS offers a burden of proof instruction  
18      beginning at Page 10. The controversy or the disagreement  
19      continues on over into Pages 11 and 12.

20              Then, finally, the summary of the patent issues  
21      is contested.

22              Let me offer this. To the extent that there  
23      remains disagreement on this issue, these issues, we can  
24      convene a later teleconference to deal with it.

25              MR. FLAGEL: That will be fine, Your Honor.

1 MR. HORWITZ: Your Honor, could we try to set a  
2 deadline today by when we will be able to get back to you  
3 either in agreement or disagreement?

4 THE COURT: Well, do you want to set a deadline?  
5 It's up to you.

6 MR. FREED: If they have a deadline in mind, I  
7 am sure I am going to probably agree with it.

8 THE COURT: I don't think I have to micromanage  
9 that. Here is what you need to keep in mind. We are  
10 awfully busy, to say the least. And I just came off trial  
11 yesterday -- you don't need to hear my problems. We have  
12 all got problems.

13 The point is that time is at a premium. So  
14 sooner rather than later helps me position something for a  
15 teleconference or some other proceeding. That's really the  
16 point.

17 Let's talk about the voir dire. Again, I didn't  
18 see anything particularly controversial.

19 I have first MPS's proposed voir dire, that is  
20 at Item 174, and actually, it was 171 that was -- Linear's  
21 was filed first. I assume you misplaced them. There is a  
22 Question 21 that frankly I don't see the need for. But it's  
23 phrased, Some of the witnesses in this case were born  
24 outside the United States and speak with an accent. Is  
25 there anything about that fact or the fact that a witness'

1 first language is not English that would cause you to be  
2 less inclined to believe that witness or rely upon his  
3 testimony? This is MPS's proposed voir dire question.

4 MR. STERN: Your Honor, there are four -- Linear  
5 and MPS have submitted virtually identical --

6 THE COURT: You have.

7 MR. STERN: There are only four differences in  
8 questions.

9 THE COURT: I counted three. I am glad to hear  
10 you picked up another.

11 MR. STERN: In our voir dire it is 18, 21, 22  
12 and 25. I may be wrong about that. I went through these  
13 last night. I believe those were the ones.

14 THE COURT: Let's talk about that one, then we  
15 can go back to 18.

16 MR. STERN: That's fine. Your Honor, overall,  
17 what we want to make sure is we suffer no prejudice at all  
18 from the jury in this case. In this case it is very likely  
19 that our witnesses will be testifying in a language other  
20 than English. We want to ferret it out in a way that is not  
21 offensive and aligned with the jury as not being any  
22 problem.

23 THE COURT: You have no problem with the  
24 question.

25 MR. FREED: I think it calls undue attention to

1 the issue. That is my problem. I don't have any problem  
2 with the substance of these, of the idea that people aren't  
3 supposed to be looked at in any different way for these  
4 reasons. But when you call it out that way, it's almost an  
5 attack that says that's what we are trying to do. That's  
6 what I don't like about it.

7 THE COURT: The thing that concerns me, that I  
8 think it doesn't give our citizens who serve on these juries  
9 sufficient credit. And we are a pluralistic,  
10 multi-cultural, multidenominational nation, and I am  
11 wondering if there is an underlying assumption that isn't  
12 fair to the jurors. It is phrased inoffensively. I don't  
13 disagree with you on that. I am just wondering about the  
14 need.

15 MR. STERN: Again, Your Honor, actually, I think  
16 if Your Honor looks at voir dire Questions 21 and 22, they  
17 both have the same --

18 THE COURT: Yes.

19 MR. STERN: It is not actually -- we actually  
20 view them as alternatives. It is not necessary that we  
21 obtain both. We are prepared to limit what Your Honor feels  
22 is most appropriate. But we want to make sure there is no  
23 problem with respect to this in light of the nature of the  
24 witnesses that we are going to be presenting.

25 THE COURT: I will give it some thought. As to

1 21 and 22, I had, frankly, missed --

2 MR. STERN: If Your Honor feels for any reason  
3 they should be reformulated, we are happy to do it.

4 THE COURT: Here is what I will do, what I  
5 typically do, if I do feel that way, in other words, if I am  
6 not just going to strike them but some reformulation is  
7 necessary, I will do that. You will get an e-mail from me  
8 in advance of this. It will actually come from Ms. Walker.  
9 We will invite your comments. Should there be comment, I  
10 will seriously consider it and either incorporate it or not.

11 MR. STERN: That is fine.

12 THE COURT: You will have the final -- how the  
13 voir dire is finally going to look before you come over to  
14 pick the jury.

15 Okay. 18. Let's see. Well, do any of you have  
16 any views that because a patent is issued by the U.S.  
17 Government it must be valid? Isn't it?

18 MR. STERN: It is certainly presumed valid. We  
19 all know that. This is trying to ferret something out from  
20 the jury to see whether or not they feel it is more than  
21 just a presumption.

22 THE COURT: I am going to tell them in the  
23 preliminary instruction, and the video is certainly going to  
24 tell them that, that statutorily and constitutionally the  
25 patent is presumed valid. I know, depending upon which side

1 of the table you guys are on in any given case, you either  
2 agree or disagree with that. I understand that.

3 Linear.

4 MR. FREED: Your Honor, I think you are going to  
5 tell them, even if the video doesn't, and even if we don't  
6 use the video, they are going to be instructed on that  
7 point. I don't think there is going to be any -- half a  
8 loaf just doesn't work here.

9 THE COURT: I think this question could  
10 potentially be a little confusing, as well. I am not going  
11 to ask this one.

12 MR. STERN: Thank you, Your Honor.

13 THE COURT: So then 25.

14 MR. STERN: Your Honor has granted our motion.  
15 So that is really irrelevant at this point.

16 I believe that's it, Your Honor.

17 THE COURT: Okay. Linear agrees?

18 MR. FREED: That 25 is out?

19 THE COURT: Yes.

20 MR. FREED: Yes, I agree.

21 We had a different 18 that they dropped,  
22 actually the substance of theirs.

23 THE COURT: Have you or anyone in your immediate  
24 family or anyone close to you ever applied for or obtained a  
25 patent in the U.S. or abroad? I typically do ask that

1 question. Any objection?

2 MR. STERN: I think we have that as 19.

3 MR. FREED: My mistake.

4 MR. STERN: No objection, Judge.

5 THE COURT: Like the final jury instructions,  
6 you will need to do some additional work on the verdict  
7 form, I think. You have competing proposals. Right? That  
8 is typically the case, and I understand that to the  
9 extent -- and I know jury verdict forms are often hotly  
10 contested items. You will need to do what you can.

11 MR. FREED: We need to work on that given your  
12 rulings as well.

13 MR. STERN: Absolutely.

14 THE COURT: All right.

15 MR. FREED: We would have to have two verdict  
16 forms if you are going to have this --

17 THE COURT: Or some form of special  
18 interrogatories.

19 MR. FREED: I mean the sequential trial issue.

20 THE COURT: Do you want to address that?

21 MR. FREED: I really do think, especially given  
22 the time issues and the Court's observation that no one  
23 wants to be pressed about July 4th Weekend, you don't want  
24 to press us, we don't want to press the jury, and you do  
25 have a prior engagement during part of the time, I think



1 that even makes more sense to do the contract stuff, get the  
2 jury out and done on that issue. Then we know where we are  
3 on whether or not there is even going to be a need to have  
4 the invalidity stuff.

5 THE COURT: Do you feel you would like some  
6 additional time to think about this, in light of the Court's  
7 ruling, and revisit this during a planned teleconference?

8 MR. FLAGEL: I think that would be good, Your  
9 Honor.

10 MR. FREED: Makes sense.

11 THE COURT: Why don't we set a teleconference  
12 date and time. What would you think, counsel, makes sense  
13 in this regard? How far out?

14 MR. FREED: To take a page out of someone else's  
15 book, I think sooner is better than later. We already know  
16 what our position is. As soon as they are ready, we are  
17 ready to talk to you about it.

18 THE COURT: Why don't you notify us that you are  
19 ready to talk. And we will let Ms. Tyer-Daly know, and we  
20 will get you on the calendar.

21 MS. JACOBS LOUDEN: If we can just ask a  
22 technical question. When we do resubmit jury materials to  
23 the Court, are you still using Word Perfect or is Word  
24 acceptable?

25 THE COURT: We do have both. In spite of the

1 fact that the rest of the world uses Word, the Federal  
2 Judiciary continues to use Word Perfect. I don't know if we  
3 have some deal with that.

4 MR. FREED: I think I know the answer.

5 THE COURT: Do you have Word Perfect capacity?

6 MS. JACOBS LOUDEN: We do. I have to say, in  
7 the private sector we always use Word. The problem is when  
8 we go to convert it to Word Perfect I think it always comes  
9 to you, as much as we try to clean up the mess, there is  
10 always some mess left in it.

11 THE COURT: We are okay with Word.

12 MS. JACOBS LOUDEN: Thank you.

13 THE COURT: The young folks over here are much  
14 more computer-literate than us old folks.

15 So a few nits.

16 Please, there will be a podium in the middle.  
17 It's over there. It has a mike. You don't have to  
18 necessarily question from the podium, but you do have to  
19 rise.

20 I don't permit questioning from the table. You  
21 don't have to be planted. Some lawyers like to walk around  
22 a little bit. I just suggest you keep your voices elevated.  
23 This is a room that does not have great acoustics. You must  
24 keep a respectful distance from the jury. I don't want my  
25 juries to be hovered over. They don't like to be hovered

1 over.

2 When you want to approach a witness, oftentimes  
3 it is the case that you will need to approach the witness  
4 multiple times during the examination. Please, just ask  
5 once. You will automatically be given leave to approach  
6 freely. With each witness, please ask for permission.

7 I am pretty formal and pretty much a pain in the  
8 neck when it comes to being here in the courtroom,  
9 particularly when our citizens are here serving. So you  
10 will see that. I will sort of morph a little bit from the  
11 more informal personality you see right now. You need to be  
12 mindful of that. And don't be offended. I will try to be  
13 formal but not unfriendly.

14 When you need to move around the courtroom, you  
15 will, to get a better view of an exhibit or something like  
16 that, just ask permission and that kind of thing.

17 Please, please, address your IT people by their  
18 surnames. It's not Ron or Jean. It's Mr., Ms. Everybody  
19 deserves the same respect in the room. Of course, you will  
20 address witnesses by their appropriate titles and surnames  
21 as well.

22 Objections, please just rise. But please do  
23 rise and make your presence known to me. Oftentimes, I will  
24 be looking at the witness or at the jury or maybe even at my  
25 computer screen. Please do not misunderstand that when I am

1 looking at that computer or maybe even typing, I am  
2 listening. I really am. I am hearing what's going on.

3 It took me a while to develop that facility.  
4 But it's almost ten years now, Mr. Horwitz, can you believe  
5 it? It does take some time for us to figure out how to do  
6 this thing called judging. I have not figured out a lot of  
7 it. But some of it I have. The one thing I have is how to  
8 pay attention. And I do pay attention to what's going on in  
9 the room. When I don't, there is an occasional lapse, I  
10 will get you over to sidebar and we will have something read  
11 back and I will say, counsel, what did you say? I didn't  
12 hear it. What is the basis of the objection? I didn't hear  
13 it. I will be frank to say that. If you think I didn't  
14 hear something, try to get me to sidebar.

15 Sidebars. I don't enjoy them because our jurors  
16 don't. They really don't enjoy the fact that we converse  
17 out of their presence. I talk to juries all the time, and I  
18 am sure you gentlemen and ladies do as well, because they  
19 feel we are hiding things from them and treating them like  
20 children, and we are not. I think our system could tolerate  
21 juries to hear more than we permit them to hear.

22 In any event, we have a white-noise machine. We  
23 will turn it on. Get me to sidebar. If you think I have  
24 blown a ruling on an objection, or you really need to get an  
25 argument on the record, and obviously we don't want to do it

1 in front of the jury necessarily, get me to sidebar.  
2 Sometimes I will be a little prickly about that. That is  
3 your job. You have got to be as thick-skinned as I am. Get  
4 me to sidebar. I will go.

5 Please, you know, counsel like to I find  
6 oftentimes refer to the number or the rule of evidence.  
7 It's not that I don't know the numbers. But I would rather  
8 hear the substance of your objection. That keys me right  
9 into what the issue is. I will confess, for a moment I have  
10 to think of the number. What is that? And it comes pretty  
11 quickly. But I just as soon you say, Hearsay, whatever you  
12 want to say. Don't argue the objection, again, in front of  
13 the jury.

14 Juror books, we will need 12 --

15 MS. WALKER: 14.

16 THE COURT: 14. Here is the thing. There are  
17 two binder issues here. I will urge you in the strongest  
18 terms to each have binders of exhibits and only the exhibits  
19 that you think are important for the jury to have in its  
20 possession.

21 I have had a couple of patent trials in the  
22 not-distant past where the lawyers for some reason in a  
23 patent case didn't prepare jury binders. And at some point  
24 during both trials jurors let it be known that they were  
25 having a difficult time following things because things were

1 flashing up on the screen and they couldn't really get a  
2 handle on the point. Even though your IT people and lawyers  
3 do a good job with that, it's a wise thing, I think a  
4 necessary thing, for you to let the jurors have what you  
5 think you need to have. Don't overwhelm them. But I advise  
6 you to have binders for each of the jurors. I am told by  
7 Ms. Walker we need 14 of those.

8 MR. FREED: On the issue of jury binders, jury  
9 books, sometimes it is also distracting to have all of that  
10 stuff in there when you are starting. Do you want that all  
11 there from the start in the jury book or filled as the  
12 evidence comes in?

13 THE COURT: I think you should have it all in  
14 there. Again, this is going to require that counsel use  
15 some judgment in terms of how much you put into a binder.

16 That raises something else. I skipped past two  
17 things. That is the subject of exhibits, because the  
18 binders have to contain exhibits that are agreed upon, and  
19 that's important.

20 All your objections to all of the exhibits are  
21 overruled, summarily, without prejudice to -- there is no  
22 way today or over the next week that we would be able to  
23 deal with all of the objections that have been interposed  
24 and the various reasons for them.

25 Therefore, what we do around here is I will get

1 together with you, either at the beginning of the day or the  
2 end of the trial day, and we will talk about exhibits that  
3 you really have a meaningful objection, an important  
4 objection to, and that you really want to advance, because  
5 otherwise, all exhibits are now in, as of this moment.

6 Those that are not objected to -- let me  
7 rephrase. Including those that have been objected to, they  
8 are now in.

9 You will get another opportunity to address that  
10 to me. But it will be as we go along.

11 Any questions about that.

12 MR. FREED: I do have one question about it.

13 I think I understand what you are saying, that  
14 they are in in the sense that no objections have been  
15 granted.

16 THE COURT: They have been overruled.

17 MR. FREED: They have been overruled. But do  
18 you actually have to make a proffer with the witness?

19 THE COURT: No.

20 MR. FREED: They are in unless you object again.

21 THE COURT: That's right. They are in. They  
22 are part of the record. So you are going to want to, this  
23 places a premium on you paying some attention to your  
24 evidence and what you feel is not proper evidence for the  
25 jury's consideration. And I will tell you that typically,

1 Delaware counsel, I think, will confirm that we don't have  
2 more than we can handle in terms of the objections. We do  
3 have, typically we have meetings in the morning at 8:30 and  
4 routinely I am available and Ms. Walker will stick her head  
5 out in the courtroom, Have you got any issues, counsel?  
6 Especially in a patent case, yes, they have issues. And we  
7 will deal with them. Typically, they are evidentiary issues  
8 of some type. It might have to do with demonstrative  
9 exhibits or evidentiary exhibits, or whatever the case will  
10 be.

11 MR. FREED: In giving that ruling, I think the  
12 next question is pretty self-evident. I take it you will  
13 have no problem with the witness books that have the  
14 witness --

15 THE COURT: That is the second binder issue.  
16 You should have binders for your witnesses. You don't have  
17 to. To the extent that you would like to use binders -- and  
18 I assume you will agree on a protocol for the exchange of  
19 exhibits, notification of witnesses, who is appearing on any  
20 given day, at any given hour and that kind of thing.

21 MR. FREED: We have agreed actually on all those  
22 exchanges, I believe, except for one. The only one that is  
23 outstanding is the demonstratives that would be used with  
24 openings and closings. Our position was that, you are  
25 always preparing your openings and closings until the last



1 minute. So that that exchange should occur, if at all, an  
2 hour before you give an opening or closing, rather than days  
3 in advance or stuff like that.

4 THE COURT: That's fine. But let me say this:  
5 To the extent you plan extensive use of demonstratives, like  
6 deposition excerpts and that kind of thing, in your  
7 openings, I am going to caution you against this. This has  
8 been an issue that has been of some -- we have been  
9 discussing this for some reason of late. MPS?

10 MR. FLAGEL: All we want, Your Honor, is we  
11 would like to have -- typically what lawyers do is prepare  
12 PowerPoints or some kind of guide for the jury during  
13 opening. We think they ought to be at least in pretty good  
14 shape by 6:00 p.m. the night before. What we would like to  
15 do is exchange them by 6:00 p.m. the night before.

16 THE COURT: Any objection?

17 MR. FREED: Yes. Because you are always doing  
18 an opening and closing after 6:00 p.m. the night before.  
19 That's why I said, how about an hour before the opening is  
20 given or the closing is given?

21 THE COURT: That doesn't give you a chance to  
22 meet with me to resolve any controversy. At some point the  
23 evening before, I will leave it to you to discuss what that  
24 hour will be. But an hour before doesn't work.

25 MR. FLAGEL: Thank you, Your Honor.

1 MR. FREED: Thank you.

2 THE COURT: I am fortunate to have good people  
3 around me remind of things that I should remember on my own.  
4 Deposition designations, I don't get involved in that  
5 controversy, those discussions. You are going to have to  
6 agree on the designations and counter-designations. I just  
7 won't do it, so there is no point in asking me to do it. I  
8 don't have the time to spend addressing the oftentimes vast  
9 numbers of depositions that you want to designate and  
10 counter-designate. So it's up to you. Sorry about that.

11 MR. HORWITZ: Your Honor, we had one question,  
12 not about the issues with the designations themselves but in  
13 presentation of the designations.

14 THE COURT: If a designation raises an important  
15 evidentiary issue, I mean an important evidentiary issue, I  
16 will get involved in that. But in terms of, you know, the  
17 editorial, the advocacy stuff that obviously is going on  
18 there and that underlies it, I am not going to get involved  
19 in that.

20 MR. HORWITZ: Thanks for the clarification. I  
21 assume we would bring that to you in the morning before.

22 THE COURT: Yes. It makes sense to. And to the  
23 extent that there remain serious evidentiary issues extant  
24 as a result of the conversations that are going to take  
25 place after you leave here, we can talk about them to the

1 extent we need to in the teleconference. Go ahead.

2 MR. HORWITZ: The one issue, if there is a  
3 witness where plaintiff made affirmative designations, we  
4 made counter-designations to their affirmative designations,  
5 we on our own made affirmative designations and they made  
6 counter-designations. I know we have done it both ways in  
7 trial. We would prefer to have the option for our  
8 affirmative designations with their counter-designations to  
9 be played during our case.

10 Their position is, for Witness A, whoever  
11 supports designations or counter-designations, they should  
12 only go in once. And if they want to do it, that means the  
13 whole thing goes in on their case. We wanted some  
14 clarification as to whether for our own affirmative  
15 designations, with their counter-designations, whether we  
16 would be able to show those in our case if we chose.

17 THE COURT: You want to show both your  
18 affirmative designations and their counter-designations at  
19 the same time.

20 MR. HORWITZ: In our case. The issue is if  
21 there is a witness where both sides have affirmative  
22 designations and then both sides have counter-designations,  
23 their position is, everything should go in in their case.  
24 Our position is we should at least have the option, if we  
25 have our own affirmative designations, to hold back those

1 affirmative designations and their counters that go along  
2 with them and put them in our case so they will be in  
3 context.

4 MR. FREED: Let me tell you what that leads to,  
5 Your Honor. I just had this in another case. It comes up  
6 more frequently.

7 The problem is that in some of the instances  
8 that he is referring to, there will be counter-designations  
9 to one party's affirmative designations that were already  
10 designations or counter-designations in the other.

11 That means the same thing is played twice and in  
12 different orders. The final ruling in the last case, for  
13 whatever it's worth was, it's just like a live witness.  
14 Everything comes in in the order it came in with a statement  
15 to the jury: Both parties were present. Take not into  
16 account who is asking the question, who is answering the  
17 question or who is sponsoring it. The point is this  
18 happened at a deposition, and both parties had the  
19 opportunity to be there. And together they are presenting  
20 this evidence to you.

21 If you do anything short of that, there is this  
22 overlap issue that you have to worry about. There is this  
23 out-of-order issue that you have to worry about. It just  
24 doesn't work.

25 MR. HORWITZ: Your Honor, we have done it both

1 ways. Mr. Freed talks about what happens in trial. I have  
2 been in plenty of trials where the plaintiff calls as an  
3 adverse witness a defendant's witness. And that's governed  
4 by scope of direct and cross, unless you make a deal,  
5 because a person has to get back to some foreign country or  
6 something. In most cases they put him on, and we put them  
7 on in our case.

8 THE COURT: I will leave it to counsel. I think  
9 there may be exceptions on both sides that you may be  
10 willing to agree to. Sure, evidence comes in a piecemeal  
11 fashion. You have correctly described typically how it  
12 comes in. Mr. Horwitz has also described those exceptions  
13 that occur. And the rules may take account of that, the  
14 rules of evidence.

15 So I am content to -- I think counsel can work  
16 this out as you go along. I don't think I need to issue a  
17 broad, overarching ruling. I am content. It seems like you  
18 are getting along okay.

19 Transitional statements, I encourage them -- you  
20 have to agree on them -- from witness to witness, subject to  
21 subject, to the extent you think it would help the jury.  
22 All of what you do, you know, you are all experienced  
23 lawyers, should be designed to inform this jury to the best  
24 of your ability so that they can figure out complex stuff,  
25 complex stuff you are going to asking them to figure out.

1 Transitional statements I believe help.

2 MR. FREED: On transitional statements, Your  
3 Honor, there are a couple kinds of them. One is kind of a  
4 mini-statement of what I think I have proved, as if it were  
5 in a closing. You are talking about what evidence is about  
6 that we are about to give.

7 THE COURT: Yes. Similar to what your opening  
8 should sound like.

9 MR. FREED: I just wanted to make it clear.  
10 Thank you, Your Honor.

11 MR. DUNLAVEY: So that I am clear,  
12 non-argumentative.

13 THE COURT: Non-argumentative. The openings  
14 should be non-argumentative. I want to let you know that --  
15 speaking of argument, two things. I will instruct near the  
16 end of the case, you will close. So you will close after I  
17 instruct.

18 This will be a timed case. It will be left to  
19 you to decide how long you want to talk to the jury, opening  
20 and closing. But that will be a part of your time.

21 The clock runs, the multiplier is five and a  
22 half hours a day. We try to get six. It usually doesn't  
23 happen. We will break for 15 minutes or so in the morning,  
24 hour for lunch, and 15 or so in the afternoon.

25 Jury goes home at 4:30. We start at 9. First

1 day we will start at 9:30, because the venire won't be ready  
2 till then.

3 Struck jury method. We will put the, about 50  
4 in the well of the Court. I will ask the general questions,  
5 according to the scripts you have already proposed, and then  
6 we will adjourn to sidebar, put the white-noise machine on,  
7 we will discuss those who responded affirmatively. I will  
8 give you an opportunity after I talk with them initially to  
9 further discuss their answers with them.

10 The jury will go back to the well. I will  
11 entertain any motions for cause. I may sua sponte dismiss a  
12 juror for cause, whatever the case may be.

13 Those dismissals, rulings, will usually occur --  
14 and they are usually agreed, usually everybody agrees. You  
15 have a juror who has child-care issues or something.

16 MR. FREED: Your Honor, will our conference with  
17 you be after your initial questions or after your initial  
18 and our followup questions?

19 THE COURT: No. There is one round of  
20 questions, general questions by me. Then we will all get  
21 together.

22 MR. FREED: Got it.

23 THE COURT: Then the pad, Ms. Walker will guide  
24 you through your exercise of peremptory challenges.

25 We will recapitulate after we do the last juror

1 just so we are all on the same page, we are all in agreement  
2 as to who has been dismissed for cause.

3 Any questions about the jury selection method?

4 MR. FLAGEL: No, Your Honor.

5 THE COURT: Your issues?

6 MR. DUNLAVEY: Your Honor, you said that trial  
7 will be recessed part of the 26th and all of the 27th. So  
8 will it be the Thursday afternoon and Friday, then we will  
9 resume the following Monday?

10 THE COURT: Monday, yes.

11 You will get the jury list typically three days  
12 before. It will have information on it regarding, it will  
13 have address information, it will have age, I think,  
14 occupation, gender. I think that's pretty much it.

15 Ms. Walker will come out on the morning of jury  
16 selection and have another list for you, because the list  
17 that you get, that you can get from Mr. Trickey, may change.

18 Your JMOL motions, as you know, the Federal  
19 Circuit requires some degree of specificity. So you are  
20 free to articulate them in some form of argument. Usually,  
21 I prefer brief argument. I don't think the Circuit requires  
22 full briefing. You can outline, submit for filing so that  
23 you can preserve your issues, you can Bench-file it,  
24 electronically file the bases for your motions.

25 I will entertain at the appropriate times and



1 intervals in the case your JMOLs.

2 MR. FREED: On that score, your formal order,  
3 formerly memorandum, now order, did rule that the motions  
4 for summary judgment were denied. But you did make some  
5 interpretations of the contract, which is going to be very  
6 helpful for trial preparation regardless of which side we  
7 are on. Can we take those as partial summary judgment on  
8 those issues so that we don't have to make proffers on those  
9 points and JMOLs on those points?

10 I have run into that situation. It is kind of  
11 goofy to have to do that since you have made a definitive  
12 interpretation. We don't want to make proffers that would  
13 be contrary to that.

14 THE COURT: I agree with that.

15 MR. FLAGEL: Yes, Your Honor.

16 THE COURT: I hadn't thought of that. Yes.

17 MR. FREED: You have to have it happen to you  
18 once, to think about it, Your Honor.

19 THE COURT: Other issues?

20 She says settlement.

21 I think I did note at the end, there have been  
22 discussions. I don't know if those discussions are ongoing.  
23 What is the status on the settlement discussions?

24 MR. FLAGEL: There haven't been discussions  
25 recently. This order hopefully will revive things. For us,

1 we have sort of been wondering all along why we are  
2 litigating a ten-dollar case. We are trying to bridge the  
3 gap. So far we haven't been able to. But we will keep  
4 trying.

5 THE COURT: Certainly, we would appreciate at  
6 the earliest inclination that you may have an agreement in  
7 principle, it doesn't have to be a final shaking of the  
8 hands, but you are moving substantially in that direction.  
9 It helps us. We won't shut down. We will continue to be  
10 ready to proceed. But it would be helpful in terms of my  
11 ordering and my staff ordering our day in terms of what we  
12 have to do on a day-to-day basis. Yours isn't the only case  
13 we have.

14 MR. FLAGEL: Understood, Your Honor.

15 THE COURT: Other issues?

16 MR. FLAGEL: Nothing from us, Your Honor.

17 THE COURT: Thank you for your time. Enjoy your  
18 Memorial Day weekend. Travel safely.

19 (Conference concluded at 11:17 a.m.)

20 - - -

21 Reporter: Kevin Maurer  
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